UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

REGIONAL DISPOSAL COMPANY,
a General Partnership[1]

Employer

and Case 19-UC-664

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
DISTRICT LODGE 751, AFL-CIO[2]

Petitioner

DECISION CLARIFYING UNIT IN PART, DENYING CLARIFICATION AND DISMISSING PETITION IN PART

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[3] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Union is a labor organization within the meaning of the Act.

The Employer is engaged in the operation of a landfill in Klickitat County, Washington. Petitioner seeks to clarify its certified unit ("Unit") of "all landfill employees", to specifically include all litter pickers and paper pickers ("pickers", herein). The Union was certified for the Unit, in Case 19-RC-13760 ("R case") on April 28, 1999. The Employer objects to the proposed certification, contending that in the pre-election hearing in the R case, the parties stipulated to the exclusion of all less-than-full-time

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1 The Employer's name appears as found correct in prior Case 19-RC-13760.

2 Petitioner's name appears as found correct in prior Case 19-RC-13760.

3 The parties filed briefs which have been considered.

pickers, that no significant changes in the duties or working conditions of the pickers have occurred since that hearing, and they therefore should remain excluded.

At the time of the hearing[4] in the R case, the Employer employed two full-time and about eight less-than-full-time pickers.[5] In the R case hearing, the parties stipulated that the two full-time pickers were included in the Unit. No evidence with respect to the less-than-full-time pickers was presented. The Employer represented to the record that the less-than-full-time pickers were "casual and intermittent" and otherwise lacked a community of interest with other employees, and that they were also "on an on-call list." No evidence was offered in support of the Employer's representations to the record, nor did Petitioner dispute the Employer's characterization of pickers. At the time of the UC hearing, there were no longer any pickers classified as "full-time."

In the R case hearing, Employer's attorney Davis mentioned the less-than-part-time pickers, saying:

> I think there are some on-call employees that are litter-pickers, basically. When the wind blows, the papers fly and there are two regular employees and we both agree that should be included through -- that this litter-picking and other miscellaneous task, but there are eight employees that are on an on-call list that we would exclude and I'm not -- I think the Union has agreed to that, but I'm not sure. I believe we're in agreement on the others.

Later, this exchange took place:

> MR. DAVIS: [T]here are litter-pickers that maintain the cleanliness of the landfill. When the wind blows, papers go every direction and these people pick up the papers. There are two regular, full-time employees which, in that paper-picker or litter-picker category that we agree are included, Charlotte Williams and Marilyn Roberts. Now those are regular, full-time employees that we would include in the unit and we would exclude the on-call paper-pickers as casual and intermittent and otherwise having no continuing community of interest with the unit employees, and I would stipulate to that effect.
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> HEARINGS OFFICER SANDERS: Just to the issue of the litter-pickers you just described, not the overall description of--
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> MR. WALSH:[6] I thought I heard him say including the on-call--
>
> HEARINGS OFFICER SANDERS: No, he said "exclude".
>
> MR. WALSH: Okay. Yes, this is the litter-pickers that are there full-time.
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> HEARINGS OFFICER SANDERS: That would exclude casual employees?
>
> MR. WALSH: Exactly.
>
> HEARINGS OFFICER SANDERS: That's received.…

In the UC hearing, Petitioner's representative Dennis London, when asked by Employer attorney Davis, "Isn't it true that at the time we made this stipulation…you intended to exclude the on-call and

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[4] The hearing was held on February 24 and March 2, 1999.

[5] In the instant hearing, Petitioner's witness testified that three or four times during the past four years, the Employer brought in 30 or 40 pickers for about two days at a time, in addition to the eight or so pickers who regularly work at the facility. No such evidence was offered in the pre-election hearing.

[6] "Mr. Walsh" refers to Ken Walsh, Grand Lodge Representative of Petitioner.

only include the regular full-time, like it says?" responded, "Based on our understanding of how they were described as casual, yes."

There is no other reference made in the R case transcript to the less-than-full-time pickers. At the time of the instant hearing, there were no longer any pickers classified as "full-time."

The R case Decision states only that the parties agreed to the inclusion of "2 paper pickers" and stipulated to the exclusion of "part-time casual paper pickers." (The balance of the facts that follow are drawn from the UC record).

Subsequent to certification, the parties entered into negotiations and reached agreement on a contract "Contract" which was ratified on November 11, 1999, signed by the Employer on December 30, 1999, and signed by Petitioner on February 11, 2000.[7] In April 2000, the parties agreed to add a unit of truck drivers also represented by Petitioner to the Unit.

The Contractual definition of the Unit is the same as that stated in the Decision and Direction of Election and the certification in the R case, that is:

> All full-time and part-time employees employed by the Employer at its Roosevelt, Washington, facilities; but excluding all truck drivers, clerical employees, janitors, casual employees, summer employees, professional employees, and guards and supervisors as defined by the Act.

The Contract provides that "A Regular Full-time Employee is defined as an Employee who is regularly scheduled to work thirty (30) or more hours each week." In Article 11 of the Contract, "Classifications and Minimum Rates of Pay," lists 16 classifications, including "Litter Picker."

An Employer witness testified that other than janitors, who are excluded from the Unit, there are no part-time employees at the facility other than the disputed pickers. There is no evidence that there were any part-time employees (other than janitors and pickers) at the facility at the time of the R case hearing, although both parties stipulated to their inclusion. The Employer witness testified that his position is that the contract definition of "full-time", as quoted above, applies only to pickers, as the issue does not arise concerning any other classification. The witness testified that "on-call" pickers can set their own schedules as to start and end times. Further, he testified that there was no discussion in Contract negotiations as to the time period applicable to determine the Contractual average of at least 30 hours a week, and he assumes it to be one year, in accordance with Employer policy.

Petitioner witnesses testified that pickers (that is, other than full-time pickers) were not discussed at all in negotiations. However, Employer witnesses, including the Employer's attorney, testified that on one occasion in negotiations, there was some discussion regarding pickers and the term "casuals" in the Unit description. The testimony did not include any details as to the discussion, except that the Employer's attorney told Petitioner's negotiators that Union representative "London [had] agreed [in the R case hearing] that the casual, the word casual in the Unit Description included the on-call paper pickers." The Employer's attorney testified that in essence the Employer took the position in negotiations that pickers were excluded from the Unit, and there was no further discussion. Petitioner's negotiators never stated that they agreed, or disagreed, with the Employer's position. There were no subsequent

[7] A Petitioner witness explained that Petitioner's delay in signing the contract was caused by a dispute unrelated to the matters at issue herein.

discussions on this topic before the Contract was ratified and signed. There was no discussion of reserving the issue for a subsequent UC petition.

In about March 2000, Petitioner made inquiries to the Employer regarding the hours of work of pickers, in connection with a grievance regarding the seniority of a laborer who had formerly worked as a picker. In April 2000, Petitioner made a written request for information from the Employer, seeking information about the hours worked by pickers during the year April 1, 1999, to March 31, 2000. The Employer declined to provide the information on grounds that the pickers are excluded from the Unit.

On about May 15, 2000, Petitioner's business representative Craig McClure, had a conversation with Peter Keller, the Employer's general manager, regarding the number of hours worked by casual employees, and seeking, without result, some resolution of the definition of "casual." In the same conversation, Keller told McClure that pickers Charlotte Williams and Marilyn Roberts had asked him to change their status from full-time to less-than-full-time. The instant UC petition was filed on May 15, 2000. McClure testified that until he investigated the above-mentioned grievance, he had been unaware of the number of hours being worked by pickers.

Keller testified that prior to the implementation of the contract, Williams and Roberts, like all pickers, had flexibility to "create" their own work schedules. After the contract was implemented, Keeler told them that they all would have to work a regular schedule, like other Unit employees. At some unspecified time, Williams and Roberts told Keller that they would prefer not to be classified as "full-time" pickers, as they wanted to retain the flexibility to adjust their work schedules at will. Keller granted their request. No other pickers were re-classified as "full-time"; thus, there are no longer any full-time pickers employed. Keller and Union witnesses all testified that pickers are currently performing the same work for about the same number of hours as they were at the time of the R case hearing.

All pickers were/are supervised by John Rogers, who also supervises landfill maintenance/construction employees (Unit employees). Pickers pick up paper and other litter which is scattered around the facility by the wind. All pickers perform the same duties side-by-side with each other, including Williams and Roberts when they were classified as full-time pickers. A post-hearing exhibit submitted by the Employer (by agreement of all parties) lists the hours of work for each of 13 pickers for each week of the year beginning May 2, 1999, and ending May 14, 2000. The exhibit also lists the average number of hours worked per week by each such employee during that year, ranging from 15 to 42 hours weekly.[8] Five averaged more than 29, while the other 8 averaged from 15 to 24 hours.

The same exhibit reveals that the average number of hours per week worked by the above-listed pickers during the three months February through April, 2000, 9 employees worked 10-13 weeks, averaging between 15 and 39 hours weekly in the weeks actually working;[9] 3 worked no hours; and one employee worked 6 weeks, averaging less than 1 hour weekly.

Conclusions

In simplest terms, the Employer's position is the Union agreed to the exclusion of the non-full-time pickers; nothing has changed; "a deal is a deal."

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[8] One employee averaged more than 40 hours weekly; 5 averaged over 30.

[9] No employee averaged over 40 hours per week worked; 5 averaged over 30.

The Union's position can be reduced to "Yes, we agreed, but we were suckered into the deal. We trusted Davis' representations, but he was lying. We shouldn't be held to the stipulation."

It is clear that had the parties litigated the Unit placement of the less-than-part-time pickers, they would have been included in the Unit, especially given the stipulation to include the "full-time" pickers. The former have a solid community of interest with the latter, and regularly work a very significant number of hours - far in excess of what could be called "casual" in Board nomenclature.

It is also clear that the parties, via their somewhat imprecise stipulation language in the R case hearing, both intended to exclude all pickers except those (two) denominated "full-time."

It is clear that the Employer did not agree during negotiations to include the other pickers, or waive its position but they were excluded. Similarly, the Union did not agree (again) during negotiations that the pickers were to be in included.

It is clear that there has been no significant change in the duties or hours worked of the paper pickers since the R case hearing. Thus, no grounds for clarification exist based on a significant-change theory.

Thus, we are left with the fact that the pickers are not "casuals" as the term is used by the Board. They regularly work a significant number of hours. True, they do not work a schedule, and they apparently need not call in to see if there is work available for them if they aren't interested in working on a given day.

The Union cannot attempt to relitigate the matter by claiming "newly discovered evidence." That angle would be available only *if* the "new" evidence had also not been available at the time of the original litigation or there were something "new." The Union *could have* adduced evidence at the time of the R case hearing, had it chosen to do so, by investigation among the Union's supporters, calling Employer witnesses or subpoenaing Employer records. The test is whether the Union *could have* discovered the evidence at the time of the R case hearing, not whether it did.

The Union might argue that Davis fraudulently deceived them by claiming the pickers were "on-call" or "casual." However, it is possible Davis was merely relying on statements of his clients, or poor information, or miscommunication. Further, he might plausibly assert the employees were "on-call", since they had no regular hours and to a large extent apparently could set their own. It *was* a stretch for Davis to assert these employees, as a class, were "casual" as the term is typically used by the Board; but, they did have substantial freedom to pick their hours. Moreover, Davis at the same time also asserted a "lack of community of interest" with the rest of the employees, as a justification for exclusion, which phrase can mean anything. The stipulation is couched is cagey words such as "we would exclude", etc. Thus, this record does not support a finding of outright fraud. Moreover, the Union was in a position easily to test the attorney's words, by calling witnesses, etc. At a minimum, it could have asked Davis to expand upon, or clarify, his words.

The Union - probably for a variety of reasons - did not challenge Davis's words, perhaps hearing what they wanted to, perhaps "trusting" Davis, or perhaps simply lacking support among the pickers, and wanting a reason to exclude them. The choice was the Union's. At a minimum, the Union voluntarily and consciously assumed the risk inherent in accepting an opponent's words unquestioningly.

Accordingly, the standard rule comes into play. A stipulation regarding unit placement made during a pre-election proceeding is binding.[10] *Grancare, Inc.,* 331 NLRB No. 9 (2000).

> Clarification is not appropriate, however, for upsetting an agreement of a union and employer concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence not express assent.

Union Electric Company, 217 NLRB 666 (1975).

Accordingly, I hereby deny the clarification sought insofar as it concerns those pickers who work less than full-time, and hereby dismiss that portion of the petition.

The parties, by Contract, have agreed that pickers who average more than 30 hours weekly are deemed "full-time" and included in the Unit. I hereby clarify the Unit to include all pickers who average more than 30 hours weekly.[11]

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by August 17, 2000.

DATED at Seattle, Washington, this 3rd day of August, 2000.

/s/ PAUL EGGERT

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385-7533-2020
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[10] Absent new, or newly discovered, previously unavailable evidence, or significant change.

[11] There may be a dispute over what time frame the average should be determined. I make no decision on that matter, since the issue and necessary facts were not presented for decision.